IN THE MISSOURI SUPREME COURT

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No. SC85460

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KENNETH L. KUBLEY,
Appellant/Respondent,

v.

MOLLY M. BROOKS,
Respondent/Cross-Appellant,

and

DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT,
DEPARTMENT OF SOCIAL SERVICES,
Respondent/Cross-Appellant.

_____

Appeal from the Circuit Court of Phelps County, Missouri
The Honorable Ralph J. Haslag, Judge

_____

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT, DEPARTMENT OF SOCIAL SERVICES

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STATEMENT OF FACTS

Because the Statement of Facts submitted by appellant/respondent Kenneth Kubley is incomplete, respondent/cross-appellant the Director of the Division of Child Support Enforcement submits the following Statement of Facts:

This matter arises out of the dissolution of the marriage of Kenneth and Molly Kubley (now Brooks). On March 25, 1994, the Phelps County Circuit Court issued its decree of dissolution of marriage dissolving the marriage of Mr. Kubley and Ms. Brooks, and awarding joint legal custody with primary care and custody of their three minor children, Kenneth, Jesse, and Bradley, to Kenneth Kubley, subject to Ms. Brooks's right of reasonable visitation, with specific visitation every weekday from Tuesday at 8:00 a.m. to Friday, six weeks during the summer and alternating holidays. (Legal File (hereinafter L.F.) 4-7). The decree stated with regard to child support, "It is further ordered by the Court that both parties be required to support the minor children."(L.F. 5) (capitalization modified).

On April 14, 1994, the court issued an Amended Decree of Dissolution of Marriage, which changed Ms. Brooks's specific visitation to every other weekend, with six (6) weeks during the summer and alternating holidays. (L.F. 8) This amended decree repeated the same language concerning child support. (L.F. 8).

On August 23, 1994, Ms. Brooks was served with a Notice and Finding of Financial Responsibility by the Division of Child Support Enforcement (DCSE), notifying her that the state was paying public assistance for her children, that the state was alleging that she owed $381.00 per month in child support for the children, and that an administrative order would

be entered if she did not respond within twenty (20) days. (L.F. 10-11). On September 29, 1994, no response having been received from Ms. Brooks, DCSE issued an Administrative Default Order, ordering Ms. Brooks to pay child support in the sum of $381.00 per month, and directing her to enroll the children in a group insurance plan, if available. (L.F. 14-16). On December 12, 1996, DCSE issued an Order Modifying Child Support Order by default, changing the amount of child support to $598.00 per month. (L.F. 21-22).

There was some litigation between Ms. Brooks and Mr. Kubley involving contempt orders based on her non-payment of the child support amounts ordered. (L.F. 18-20). The Phelps County Circuit Court issued an order on September 29, 1998 modifying the child support to $500.00 per month. (L.F. 103).

Between September 29, 1994 and September 1, 1998, the effective date of the September 29, 1998 Modification, DCSE obtained a total of $21,649.00 in child support payments from Ms. Brooks, according to its payment records. (L.F. 103-04).

It was not until April 13, 1998, approximately three and one-half years after the initial Notice and Finding of Financial Responsibility, that Ms. Brooks filed her "Third Amended Counter Motion to Modify Decree of Dissolution of Marriage as to Child Custody, Visitation, and Child Support." (L.F. 23). There, for the first time, Ms. Brooks alleged various statutory and common law torts against DCSE and its director. The director filed a motion to dismiss the Third Amended Countermotion. (L.F. 51). There, the director asserted that the circuit court lacked jurisdiction over the third party claim, and that the pleading failed to state a claim. (L.F. 54-58). The director also filed a "Supplemental

Motion to Dismiss Damages Claims Against Director of Division of Child Support Enforcement," asserting that Ms. Brooks was estopped from attacking the allegedly void child support orders based on her compliance with them and acquiescence in them. (L.F. 60-62).

On April 20, 2002, the Phelps County Circuit Court held a one-day trial on the issues raised in the Third Amended Countermotion, as well as other issues related to child custody between the parties. (Tr. 1 *et seq*). At that hearing, Ms. Brooks admitted that it was not the duty of the Director of the Division of Child Support Enforcement to support her children. (Tr. 204). She also admitted that she had complied with the child support orders that had been entered against her, to the best of her ability. (Tr. 206).

The circuit court held a further hearing on October 30, 2001, primarily to receive additional arguments from the attorneys for the parties. (Tr. 350). The circuit court entered its final judgment on February 8, 2002. The circuit court, *inter alia*, awarded Ms. Brooks $21,649 jointly and severally against Mr. Kubley and the Director of the Division of Child Support Enforcement. (L.F. 107). The court rejected the remainder of her damage claims. (L.F. 107). In its Judgment, the circuit court found that "[t]here was no order for Ms. Brooks to pay child support in the amended Decree of Dissolution of Marriage entered in 1994." (L.F. 104).

All parties filed appeals. The Court of Appeals for the Southern District would have reversed the circuit court in part. The Court of Appeals believed the first point in this brief was dispositive in that because no child support order had been entered, DCSE had the

authority to pursue child support from Ms. Brooks under § 454.470 and § 454.475, RSMo. *See* Slip op. at 9. It did not reach the remaining points.

This Court granted Ms. Brooks' Application for Transfer.

POINTS RELIED ON

I.

The trial court erred in entering judgment against DCSE and holding that DCSE's administrative actions were invalid because DCSE had administrative authority to establish a child support order under Section 454.470.1 and later modify the administrative decree under Section 454.500 in that, as the trial court acknowledged, there was no order for Molly Brooks to pay child support in the amended decree of dissolution of marriage entered in 1994.

§ 454.470.1, RSMo

§ 454.460(2), RSMo

§ 454.500, RSMo

State ex rel. Hilburn v. Staeden, 91 S.W. 3d 607 (Mo. banc 2002)

Dye v. Division of Child Support Enforcement, 811 S.W. 2d 355 (Mo. banc 1991)

Binns v. Missouri Div. of Child Support 1 S.W. 3d 544 (Mo. App. E. D. 1999)

II.

The trial court erred in entering judgment against DCSE because Ms. Brooks's claim was an action for money had and received against the State, for which the State has not waived immunity.

Gas Service Company v. Morris, 353 S.W. 2d 645 (Mo. 1962)

Kleban v. Morris, 247 S.W. 2d 832 (Mo. 1935)

III.

The trial court erred in entering judgment against DCSE because Ms. Brooks's claim was barred by the doctrine that a party who complies with allegedly void orders is later estopped from challenging them in that Ms. Brooks chose to comply for 3 ½ years with the orders requiring her to pay child support before she suddenly claimed the orders were invalid.

State Dept. of Social Services v. Houston, 989 S.W. 2d 950 (Mo. banc 1999)

State ex rel. York v. Daugherty, 969 S.W. 2d 223 (Mo. banc 1998)

Perkel v. Stringfellow, 19 S.W. 3d 141 (Mo. App. S. D. 2000)

Schulte v. Schulte, 949 S.W. 2d 225 (Mo. App. E. D. 1997)

IV. (as Respondent)

Assuming anyone is liable to Ms. Brooks for any part of the amount at issue, the circuit court did not err in holding Kenneth Kubley jointly and severally liable with the director for any refund due to Ms. Brooks because Kenneth Kubley was the main recipient of the amounts collected by the director and should properly make restitution. (Responding to Appellant's Point).

State v. Public Service Commission, 244 S.W. 2d 110 (Mo. 1951)

Smith v. Smith, 17 S.W. 3d 592 (Mo. App. S. D. 2000)

Petrie v. LeVan, 799 S.W. 2d 632 (Mo. App. W. D. 1990)

ARGUMENT

I.

The trial court erred in entering judgment against DCSE and holding that DCSE's administrative actions were invalid because DCSE had administrative authority to establish a child support order under Section 454.470.1 and later modify the administrative decree under Section 454.500 in that, as the trial court acknowledged, there was no order for Molly Brooks to pay child support in the amended decree of dissolution of marriage entered in 1994. [1]

Section 454.470.1, RSMo, (1994) authorized the issuance of a Notice and Finding of Financial Responsibility and entry of an administrative order establishing child support if no timely response is received, "[i]f a court order has not been previously entered." "Court Order" is defined for the purposes of § 454.470 at § 454.460(2), RSMo (1994) as "any

[1] This was a bench tried case. The Director's appeal concerns errors of law which are reserved for the independent judgment of the appellate court. See, *e.g.*, *Earls v. Majestic Pointe, Ltd.*, 949 S.W.2d 239, 246 (Mo.App. S.D. 1997). This same standard of review applies to each point of error.

judgment, decree, or order of any court which orders payment of a set or determinable amount of support money."

That § 454.470 permitted DCSE to act as to Ms. Brooks's support obligation is apparent from the language of the dissolution decree. The language concerning child support in the March 25, 1994 decree and the amended decree of April 14, 1994, while ordering both parties to support the minor children, did not order "payment of a set or determinable amount" as defined by § 454.460(2), RSMo. Accordingly, when the circuit court did not undertake to act upon the issue of support money, that issue remained open to administrative action. See *State ex rel. Hilburn v. Staeden*, 91 S.W. 3d 607, 610 (Mo. banc 2002); *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355, 360 (Mo. banc 1991); *Binns v. Missouri Div. of Child Support*, 1 S.W. 3d 544, 547 (Mo. App. E. D. 1999) (citing *Dye*).

The circuit court here specifically found what was necessary for § 454.470 to apply. It found that "[t]here was no order for Ms. Brooks to pay child support in the amended Decree of Dissolution of Marriage entered in 1994." (L.F. 104).[2] And if there was no order for Ms. Brooks to pay child support, there was certainly no order requiring payment

[2] It goes almost without saying that the circuit court was in the best position to interpret its own orders. See, *e.g., Matter of VMS Securities Litigation*, 103 F.3d 1317, 1321 (7th Cir. 1996); *see also Cave v. Singletary*, 84 F.3d 1350, 1354-55 (11th Cir. 1996) (noting deference normally given to district court's interpretation of its own orders).

of a set or determinable amount of support money under § 454.460(2), RSMo. Further, if there was no order for Ms. Brooks to pay child support, there was certainly no "enforceable support order," and DCSE was authorized to act. *See Hilburn*, 91 S.W. 3d at 610. Accordingly, under the circuit court's own analysis of its 1994 dissolution decrees DCSE had sufficient jurisdiction under § 454.470, RSMo to issue the Administrative Default Order of September 29, 1994 and its Order Modifying Child Support Order of December 9, 1996.[3] Those orders are valid under the statutes and under this Court's decision in *Dye*.

Accordingly, the circuit court's order finding DCSE's administrative orders invalid should be reversed based on the circuit court's own finding that there was no order for Ms. Brooks to pay child support in 1994.

[3] Modifications of administrative support decrees are specifically authorized by Section 454.500, RSMo.

II.

The trial court erred in entering judgment against DCSE because Ms. Brooks's claim was an action for money had and received against the State, for which the State has not waived immunity.

This is, of course, an action against the State for money. [4] As a general rule, such actions are barred by sovereign immunity. Ms. Brooks cannot use the usual means of avoiding immunity; neither of the statutory exceptions, for dangerous conditions and motor vehicle accidents, could possibly apply here. Thus she relies on an alleged uncodified exception for suits for money had and received. But the Legislature has permitted no such exception.

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[4] At various points in the Third Amended Counter Motion to Modify, Ms. Brooks named the State of Missouri, Division of Child Support Enforcement (L.F.31) and the Director of the Division of Child Support Enforcement (L.F. 33). At no point did she name any person who is or was the director. Because "[a] party to an action is a person whose name is designated on the record as a plaintiff or defendant," *Bergsieker v. Schnuck Markets, Inc.*, 849 S.W.2d 156, 165 (Mo.App.E.D. 1993), and no name has been used, the defendant must be the director in official capacity. *See also Betts-Lucas v. Hartmann*, 87 S.W.3d 310, 327 (Mo.App.W.D. 2002) (where plaintiff does not specifically state capacity, court assumes Commissioner of Administration sued in official capacity); *Johnson v. Outboard Marine Corp*., 172 F3d 531, 535 (8th Cir. 1999) (where plaintiff does not specify, official capacity is presumed).

In ruling for Ms. Brooks, the circuit court relied on *Palo v. Stangler,* 943 S.W.2d 683 (Mo. App. E.D. 1997), apparently for the proposition that Ms. Brooks's claim sounded in contract and therefore was exempt from the application of sovereign or official immunity. But the reasoning in *Palo* is fatally flawed.

Palo arose when the Department of Social Services withheld from a father's employer more money than he owed the state for child support. The father brought an action for money had and received against the Missouri Department of Social Services and its director to recover the excess amount. The trial court granted judgment to the father. On appeal, the defendants argued that, based upon sovereign immunity, they were immune from liability. The Court of Appeals affirmed the judgment, reasoning that a claim for money had and received is a contract action, not "an action in tort; and thus the doctrine of sovereign immunity is not applicable." *Palo*, 943 S.W. 2d at 685. But in *Palo* the court missed Missouri precedent on the application of sovereign immunity to an action for money had

and received. [5]

Most notable is *Gas Service Company v. Morris*, 353 S.W.2d 645 (Mo. 1962). There the plaintiff sought to recover money paid as taxes that plaintiff alleged had been illegally assessed, collected, and withheld. This Court affirmed the dismissal of the plaintiff's action, on the grounds of sovereign immunity, holding, *inter alia*:

> [Plaintiff] contends, however, that even if the well-settled proposition that the state may not be sued without its express consent is applicable, the state has consented to be sued in this action for money had and received. We have the

[5]In *Karpierz v. Easley*, 31 S.W.3d 505, 511 (Mo.App.W.D. 2000), the Court of Appeals, Western District, restated, in self-acknowledged dicta, the conclusion of *Palo* regarding the inapplicability of sovereign immunity to an action for money had and received brought against a state entity for wrongful forfeiture. But that dicta adds no ammunition to Ms. Brooks's attack. Not only does the dicta in *Karpierz* have no precedential value, it is as inaccurate as the Palo reasoning is flawed.

> opinion that [plaintiff 's] position is untenable and that its contention has been ruled adversely to it in *Kleban v. Morris*,[247 S.W.2d 832, 837-9 (Mo. 1935)].

Gas Service Company, 353 S.W.2d at 648. [6] Accordingly, binding precedent from this

[6]Nothing in *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52 (Mo. 1972) is to the contrary. There the Court merely held that when the State entered into a signed, legislatively-authorized contract it is bound by it like any private party because the State consents to suit when it enters into a validly authorized contract. *Id*. at 54. No signed, legislatively-authorized contract is at issue here.

Court holds that money had and received is not a valid cause of action against a state official.[7]

The court in *Palo* also failed to correctly analyze the development of sovereign immunity in the State of Missouri. The common law rule until 1977 was that the state, "by reason of its sovereign immunity, is immune from suit and could not be sued in its own courts without its consent." *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798, 801 (Mo. banc 1965) (citing *Kleban v. Morris*, 247 S.W.2d 832, 836 (Mo. 1952)). In 1977, this Court in *Jones v. State Highway Commission,* 557 S.W.2d 225, 230 (Mo. 1977), abrogated this rule in tort cases, but did not otherwise change the common law of sovereign immunity. Outside of tort liability, *Jones* did not disturb the rule that the state cannot be

[7]Moreover, a decision from one other jurisdiction has also refused to recognize an exception to sovereign immunity for money had and received. *See Anderson v. Department of Revenue*, 828 P.2d 1001, 1005-06 (Ore. 1992) ("With regard to taxpayers' claims for money had and received . . . taxpayers point to no statute that waives the state's sovereign immunity to such claims").

sued without its consent.

Less than a year after *Jones*, the Legislature reversed the judicial abrogation of tort immunity. In 1978, HB 1650, codified as § 537.600, RSMo 1994, reinstated (with two exceptions not relevant here -- dangerous conditions and motor vehicle accidents), the doctrine of sovereign tort immunity as it existed before *Jones*. *Palo v. Stangler* is wrong in failing to note that in reinstating sovereign tort immunity, § 537.600 made Missouri's tort law, which this Court had altered, once again consistent with the unchanged law regarding other suits. Now a single rule applies to tort and non-tort suits alike. Absent constitutional or statutory consent, the state may not be sued in its own courts. *See Fort Zumwalt School District v. State* , 896 S.W.2d 918, 923 (Mo. banc 1995).

This rule applies across the board, barring tort suits and non-tort suits such as actions for money not paid as required by statute, *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995), suits for recovery of taxes/fees erroneously paid or illegally collected by the state, *Matterson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995); *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975), claims for court costs, *Richardson v. State Highway and Transportation Commission*, 863 S.W.2d 876, 882 (Mo. banc 1993), suits to set aside a will codicil in which the state is a necessary party, *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798 (Mo. banc 1965), and suits for damages resulting from non-performance of statutory duties, *State ex rel. Missouri Department of Agriculture v. McHenry*, 687 S.W.2d 178 (Mo. banc 1985). Simply put, the sovereign may not be sued for money without its consent. The state has not consented

to suits for money had and received, and therefore the circuit court erred in allowing Ms. Brooks to recover the amounts collected for child support.

Moreover, even if the court were to accept the *Palo* result, that case is still distinguishable. The claim in *Palo* was for a simple overwithholding that could not in any sense be justified, as the Department collected more child support than the plaintiff there owed. 943 S.W. 2d at 684. The court held that "[a]n action for money had and received is proper where the defendant received money from the plaintiff under circumstances that in equity and good conscience call for defendant to pay it to plaintiff." *Id.* at 685 (emphasis added). Here, if Ms. Brooks receives a refund of her child support payments from the state, she will have avoided payment of child support for four years. This is inconsistent with "equity and good conscience," because parents have a duty to support their children, as Ms. Brooks readily acknowledged. (Tr. 204). It is also the public policy of this state, as expressed in Chapter 454 of the Revised Statutes of Missouri, that parents pay to support their children. Thus, "equity and good conscience" do not require a refund of her child support payments.

Accordingly, whether this Court follows *Palo* or not, Ms. Brooks should not receive a refund of her child support.

III.

The trial court erred in entering judgment against DCSE because Ms. Brooks's claim was barred by the doctrine that a party who complies with allegedly void orders is later estopped from challenging them in that Ms. Brooks chose to comply for 3 ½ years with the orders requiring her to pay child support before she suddenly claimed the orders were invalid.

Ms. Brooks is estopped from attacking the allegedly void DCSE administrative order against her based on her compliance with the judgment and her acquiescence in that judgment.

It is well settled that parties who comply with allegedly void orders are estopped from later challenging them. In *Perkel v. Stringfellow*, 19 S.W.3d 141, 149-50 (Mo. App. S.D. 2000), the court held that a party was estopped from challenging a pendente lite order for alleged voidness (in part because it was not signed by a judge), because the party had acquiesced in the allegedly void order by complying with it. *See also Schulte v. Schulte*, 949 S.W. 2d 225, 227 (Mo. App. E. D. 1997) (where party acquiesces in judgment against them, they waive their right to appeal).

This Court discussed this waiver doctrine in more detail in *State ex rel. York v. Daugherty*, 969 S.W. 2d 223, 225 (Mo. banc 1998):

> It has often been said that a void judgment is no judgment; that it may be attacked directly or collaterally . . . It neither binds nor bars anyone . . .. [Y]et, notwithstanding, a party to such judgment may voluntarily perform it, by

> paying the amount adjudged against him and, when paid, no inquiry will be made as to the validity of the judgment; or he may perform the acts required by a void decree, or accept its benefits, and thereby estop himself from questioning the decree. In other words, a party to a void judgment or decree may be estopped from attacking it, either directly or indirectly.

Id.; see also State Dept. of Social Services v. Houston, 989 S.W. 2d 950, 952 (Mo. banc 1999) (15 months failure to challenge validity of child support modification order when circumstances called for expressing a position contrary to compliance held to be conduct affirming the validity of the order). Here, Ms. Brooks did not challenge the validity of the Director's actions for over three and one half years even though she had ways to challenge the actions. Thus, Ms. Brooks is estopped to challenge the validity of the support orders for that period.

The Director made this argument to the circuit court, but that court rejected it. The court declined to apply the doctrine because it believed that Ms. Brooks was required to comply with the child support orders under threat of incarceration. (L.F. 106). The threat of some sort of sanction for non-compliance with a court order is not relevant to applying the acquiescence doctrine. The Director is aware of no court or agency order that is not backed up by some sort of sanction, including sometimes incarceration, for non-compliance. *See, e.g. Lyons v. Sloop*, 40 S.W. 3d 1, 10-11 (W.D. Mo. 2001) (discussing prima facie requirements for civil contempt); *In re Marriage of Petersen*, 22 S.W. 3d 760, 765 (Mo. App. S.D. 2000) (when former spouse proves that other has failed

to make payment under dissolution decree, prima facie case of contempt has been shown); *State ex rel. Div. of Family Services v. Bullock*, 904 S.W. 2d 510, 513 (Mo. App. S.D. 1995) (discussing the remedial nature of civil contempt -- it is to enforce obedience to judgment by party judgment intends to benefit). To hold that a party can avoid estoppel by compliance simply by arguing that they were concerned that some sort of sanction -- including contempt proceedings -- might have befallen them had they not complied would completely vitiate the estoppel by compliance doctrine.

One other case merits discussion. In *Wampler v. Director of Revenue,* S.W.3d 32 (Mo. Banc 2001), the court rejected applying the estoppel by compliance argument to the Director of Revenue when the Director reinstates driving privileges pursuant to a court order and then chooses to pursue an appeal. *Id*. at 34-35 ("It would be an absurd result not intended by the legislature to require that the director risk being held in contempt of court in order to preserve the right to appeal in cases such as this"). That fact situation is not present in this case. Ms Brooks could have paid the child support she was ordered to pay, and simply moved to modify her child support obligation at the same time, under RSMO § 454.500.

Accordingly, this Court should reverse the circuit court's holding.

IV. (as Respondent)

Assuming anyone is liable to Ms. Brooks for any part of the amount at issue, the circuit court did not err in holding Kenneth Kubley jointly and severally liable with the Director for any refund due to Ms. Brooks because Kenneth Kubley was the main recipient of the amounts collected by the Director and should properly make restitution. (Responding to Appellant's Point).

Kenneth Kubley argues in his brief as appellant that the circuit court erred in holding Kenneth jointly and severally responsible with the Director for the amounts collected under the allegedly invalid decrees. *See* Appellant's Opening Brief at 8-9. But nothing in the authority he cites–*Palo v. Stangler*–requires the result he seeks. Simply put, there is nothing in the *Palo* decision that precludes joint and several liability in a case like this.

The court should instead draw an analogy from the law regarding restitution and unjust enrichment. This Court has held that when an erroneous judgment has caused money to pass from one person to another, restitution should occur such that "the one receiving a benefit as the result of the erroneous judgment restore that benefit." *State v. Public Service Commission*, 244 S.W. 2d 110, 117 (Mo. 1951) (citing cases). The law as to unjust enrichment is similar: A person who has been unjustly enriched at the expense of another is compelled to make restitution. *See, e.g., Smith v. Smith*, 17 S.W. 3d 592, 597 (Mo. App. S. D. 2000); *Petrie v. LeVan*, 799 S.W. 2d 632, 634 (Mo. App. W. D. 1990).

That is what will have occurred in this case, assuming that the circuit court's other rulings are affirmed. The great majority of the money that the Director collected was not

retained by his office, but was provided to Kenneth Kubley, the custodial parent. (Tr. 50). [8] Assuming for the sake of argument that someone was unjustly enriched, it was not the Director--it was Kenneth Kubley. Under the cases above discussing restitution and unjust enrichment, it was entirely appropriate for the circuit court to at least make Kenneth Kubley jointly and severally liable for the return of any funds illegally collected for the benefit of Kenneth Kubley.

[8]Defendant's Exhibit A shows that $17,458 was paid to Kenneth Kubley, while $4,191 was retained by the State. (Def. Ex. A at 4 - support Calculation Summary).

CONCLUSION

For the reasons submitted above, the judgment of the circuit court should be reversed in part and, if it is necessary to reach the issue of Mr. Kubley's joint and several liability, affirmed in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing and a 3 ½ inch labeled diskette containing this brief were served by mailing a copy thereof, via U.S. Mail, this 2nd day of October, 2003, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with limitations contained in Missouri Rule of Civil Procedure 84.06, and that the brief contains 5181 words.

The undersigned further certifies that the diskette simultaneously filed with the hard copies of this brief has been scanned and is virus free.

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Assistant Attorney General